

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Carriage of the Transmissions)
of Digital Television Broadcast Stations)
)
Amendment to Part 76)
of the Commission's Rules)

CS Docket No. 98-120

COMMENTS OF

LIFETIME ENTERTAINMENT SERVICES

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SUMMARY

Lifetime is a non-vertically integrated programmer that operates two basic cable networks targeted for female viewers: the well-established "Lifetime Television," and the recently-launched "Lifetime Movie Network" ("LMN"). Because Lifetime is entirely dependent on cable and other MVPDs to distribute its programming, it opposes any regulatory program that exacerbates its struggle for access to scarce cable channel capacity. Lifetime is, in fact, currently encountering considerable difficulty in attaining cable distribution for LMN. Confronted with limited channel space, it has historically experienced difficulty in maximizing distribution for Lifetime Television, notwithstanding that network's popular and critical acclaim.

Imposing digital must carry during the current transition period is patently unconstitutional. While it may have been (barely) permissible for Congress to enact an analog must carry statute, the imposition of additional must carry regulations by the Commission simply would not be sustained. The existing justifications for analog must carry, after all, do not apply in the digital context, and a desire to facilitate the technological transition to DTV cannot justify further subordinating cable networks' First Amendment rights.

The Commission must appreciate that imposing digital must carry during the transition period would severely disrupt cable programmers, cable operators, and cable customers. Each DTV signal is entirely new, and most cable systems are already channel-locked. If digital must carry were imposed immediately, cable networks would be replaced by either a blank screen or redundant DTV signals. Digital must carry would also make it

virtually impossible for LMN and other recently-launched cable networks, which lack the option of an over-the-air broadcast, to secure sufficient carriage on cable systems to survive. Finally, advancements in A/B switches and antennas for DTV eliminate any constitutionally permissible basis for digital must carry.

Even if digital must carry were constitutionally permissible, the Commission has no authority under the Communications Act to create such rules during the transition period. Under Section 614(b)(4)(B), must carry can apply only *after* the transition to digital has been completed. This interpretation fully comports with the legislative history and the existing prohibitions on applying analog must carry to cases involving duplicative programming. Congress clearly did not intend to confer automatic must carry status on DTV signals during the transition period.

A variety of compelling "public interest" concerns suggest that providing an automatic competitive preference to digital broadcasters would be unfair, unwise, and premature. Most importantly, digital must carry would have a devastating impact on programming diversity. Popular programming channels would be lost so that a fortunate few could enjoy the benefits of digital television. Moreover, digital must carry cannot be rationalized as necessary to combat potential ill-effects from cable's alleged "bottleneck" control over video programming delivery — the scarcity of HDTV sets is the true "bottleneck."

In any event, government intervention would be premature. Digital television is in its very infancy, and constructive negotiations have begun for carriage of DTV signals.

The Commission should permit *market forces* to function prior to any new regulatory intrusion into this process.

For these reasons, Lifetime urges the Commission to forbear from adopting digital must carry rules at this time.

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**COMMENTS OF
LIFETIME ENTERTAINMENT SERVICES**

Lifetime Entertainment Services ("Lifetime") files these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released July 10, 1998, in the captioned proceeding. Lifetime strongly opposes the imposition of new digital must carry obligations on the nation's cable operators. Extending additional carriage preferences to a select group of programmers (*i.e.*, broadcasters), who already have the ability to reach television households through their over-the-air transmissions, will further prejudice independent cable programmers (like Lifetime) and reduce programming diversity.

I. LIFETIME WOULD BE ADVERSELY IMPACTED BY NEW DIGITAL MUST CARRY RULES

Lifetime is a committed supporter of programming diversity, having established an identity for itself as the premier outlet of "television for women." Lifetime operates two

"basic" cable networks:¹ the well-established "Lifetime Television" and the recently-launched "Lifetime Movie Network" ("LMN") (collectively, the "Lifetime Networks").

Lifetime Television is one of the country's most widely-distributed cable program networks, reaching over 72 million households, or approximately 93% of all cable homes. This success is particularly impressive given the fact that Lifetime is not vertically integrated with any cable operator. The network is also one of the highest-rated of the basic cable program networks — ranked fourth among basic cable networks in total day household ratings and sixth in prime time ratings.² Lifetime Television targets women with an entire program schedule of high-quality contemporary programming: original movies, daytime and prime-time original series, including its highly-acclaimed "Any Day Now" and "Intimate Portraits," specials and lifestyle information programs, and award-winning public service campaigns such as breast cancer awareness and child care initiatives. Lifetime ranks first among cable networks for its targeted demographic of women age 18-49,³ demonstrating that it is meeting its goal of providing programming to a traditionally underserved segment of the television audience.

On June 29, 1998, Lifetime launched LMN, which airs contemporary made-for-television movies, select theatrical films and mini-series from the Lifetime Television movie library. The movies cover every dimension of a woman's life. LMN was

¹ While Lifetime uses the term "cable network(s)" in these comments for convenience, it emphasizes that the Lifetime Networks are carried on a host of alternative multichannel video programming distributors ("MVPDs"), including DBS and C-band satellite systems, as well as OVS, SMATV and MMDS systems.

² Nielsen Media Research, 3rd Quarter 1998.

³ *Id.*

created in response to audience demand and is the next step in Lifetime's goal to be the primary producer and exhibitor of movies for women. Although Lifetime had long considered the launch of a second network, it created LMN for digital carriage, in response to cable operators' specific request for "brand extension" digital programming and in recognition of the current lack of available analog capacity. LMN is offered on a compressed digital feed to maximize bandwidth efficiency. Lifetime believes that LMN and other high-quality digitally-delivered networks will help drive consumer demand for digital product and will provide cable operators with strong incentives to make bandwidth-efficient digital programming tiers available to subscribers.

Lifetime is, of course, entirely dependent on cable and other MVPDs to deliver the Lifetime Networks to viewers, and the Company's business plans revolve around success or failure in this area. The need for broad-based cable distribution is particularly important for services, like the Lifetime Networks, that are built on attracting substantial advertiser support. This support enables Lifetime to provide high-quality programming services with relatively low license fees. If cable distribution is restricted, ratings will necessarily suffer, advertising support will decline, and Lifetime's only option to break a downward spiral will be to increase license fees (which then will be passed on to consumers). Significantly, the financial loss associated with a decline in distribution is magnified in the television advertising market, because many advertisers lose interest in a network that cannot provide national, or near-national, distribution.

Cable systems historically have had limited channel capacity, and demand for that capacity has invariably exceeded supply. While channel capacity continues to grow, so

too do the demands for that capacity. Lifetime finds itself increasingly competing not only against other basic cable networks, but also against greatly expanded pay-per-view line-ups designed to provide "near video on demand." Cable operators with upgraded plant are also devoting substantial capacity to Internet access and telephony. These competing uses of cable capacity are critical to providing cable operators with the additional revenue necessary to finance their upgrades and enhance the nation's communications infrastructure.

Despite the popularity of its programming, Lifetime has encountered great difficulty in attaining and maintaining cable distribution for Lifetime Television in the face of limited channel space. After more than 14 years of successful operation and widespread critical and popular acclaim, Lifetime Television still is not available to 5 million cable homes. Even more disturbing is the fact that Lifetime Television already has experienced the adverse effects of governmental regulation. When the must carry rules were first implemented in 1992, many systems throughout the country dropped or threatened to drop the service in order to accommodate more broadcast networks. Cable rate regulation imposed additional subscriber losses and delayed channel launches that would have increased existing distribution. The negative impact on Lifetime Television clearly was not a reflection on the value, quality, or ratings of the service. The problem is even more dire in the case of Lifetime's new service, LMN. Notwithstanding LMN's very limited capacity demands, Lifetime has encountered considerable difficulty securing new channel space, and LMN is expected to be in fewer than 3 million households by year end.

Lifetime clearly would be adversely affected by any regulation that makes it even more difficult for its Networks to gain access to television households. Not surprisingly,

Lifetime is alarmed by the possibility that the Commission might now grant additional must carry rights to thousands of broadcast licensees. The imposition of such rules could have a disastrous impact on cable programming networks, as the resulting carriage obligation would produce an enormous drain on the amount of cable channel capacity available for non-broadcast programming. Cable programming networks, which lack the option of an over-the-air broadcast to reach television households, would be subjected to a substantial operating penalty.

It is imperative that the Commission fully appreciate the enormous harm digital must carry would impose on independent cable networks. Rather than competing for channel space on a level playing field, Lifetime already faces rivals armed with such government-mandated advantages as analog must carry, commercial leased access, and PEG access, as well as business-mandated advantages as affiliated programmers. Imposing digital must carry would give broadcast programmers a whole new (and very large) carriage preference over cable programmers, who are every bit as deserving. Lifetime respectfully submits that the Commission should forbear at this time from adopting digital must carry rules (which would imbalance the playing field still further) during the period when broadcasters will be transitioning from analog to digital transmissions.

II. THE COMMISSION IS LEGALLY BARRED FROM IMPOSING A DIGITAL MUST-CARRY OBLIGATION ON THE CABLE INDUSTRY

A. Digital Must-Carry Is Unconstitutional

When Congress adopted the current must carry rules for analog broadcast signals in 1992, the Court of Appeals for the D.C. Circuit had already struck down two

different versions of FCC-imposed rules on First Amendment grounds.⁴ The Congressionally imposed version, 47 U.S.C. § 534, has just barely survived similar constitutional challenges. In two separate Supreme Court decisions in 1994 and 1997, the rules were upheld by the narrowest of possible margins.⁵ The Court was closely divided (5-4) and exceptionally fragmented in both cases, demonstrating the tenuous constitutional nature of must carry rules for analog broadcast signals.⁶ At issue is the government's ability to favor certain speakers (*i.e.*, broadcasters) over other speakers (*i.e.*, cablecasters).

Justice Breyer, in his concurring opinion in *Turner II*, discussed the troubling First Amendment implications of mandatory carriage of broadcast signals, stating:

[must carry] extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This "price" amounts to a "suppression of speech."

Turner II, 117 S. Ct. at 1204 (citation omitted).

Analysis of the *Turner* cases shows that new must carry requirements for digital broadcast signals would not withstand judicial review. The existing must carry rules

⁴ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) ("*Quincy Cable*"); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) ("*Century Communications*").

⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622; 114 S. Ct. 2445 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180; 117 S. Ct. 1174 (1997) ("*Turner II*").

⁶ In *Turner I*, only a plurality of Justices joined the Court's opinion and four Justices issued separate opinions. Likewise, *Turner II* was decided by a 5-4 margin. Only three other Justices joined the Court's opinion, while Justice Breyer filed an opinion concurring in part. Justice O'Connor, joined by three Justices, dissented strenuously.

survived Supreme Court scrutiny in large part because the Court deferred to Congressional judgment.⁷ But Section 614(b)(4)(B) does not mandate digital must carry. Assuming *arguendo* that the statute does not absolutely bar the imposition of additional carriage rights during the "transition" from analog to digital, it certainly does no more than leave the matter open for consideration by the Commission. Yet Commission-created digital must carry rules would be subject to a substantially less-deferential standard of review by the Court. In other words, a legal challenge to new rules likely would produce results less like the *Turner* cases and more like the *Quincy Cable* and *Century Communications* cases (where the D.C. Circuit struck down Commission-imposed must carry rules as violative of the First Amendment). While it may have been constitutionally permissible for *Congress* to pass a *statute* imposing must carry obligations for analog broadcast signals, the imposition by the Commission of *additional* must carry requirements *by regulatory fiat* would not be sustained by the Court.

Another critical way in which digital must carry rules differ from analog must carry is the underlying justification for such rules. The predominant federal justification for analog must carry requirements was protecting noncable households from the "loss of **regular** television broadcasting service."⁸ But the loss of regular television broadcasting service is not relevant in the context of digital must carry — broadcasters will retain their full analog must carry rights during the transition period, even if the Commission refrains from imposing digital must carry. Nor can a desire to promote the "widespread dissemination of information

⁷ In fact, the Supreme Court stated that its review under the *Turner* cases is measured "by a standard more deferential than we accord to judgments of an administrative agency." *Turner II*, 117 S. Ct. at 1189.

⁸ *Turner II*, 117 S. Ct. at 1186 (citing *Turner I*, 114 S. Ct. at 2470) (emphasis added).

from a multiplicity of sources"⁹ be considered applicable to digital must carry. Imposing new digital must carry obligations (in addition to the existing analog must carry obligations) during the current transition period would add no new speakers and would instead give broadcasters already assured of one cable channel a *second* cable channel allocation. Common sense dictates that a rule requiring cable operators to drop diverse cable programming sources in favor of redundant broadcast stations would *impede*, rather than promote, the "diversity of speakers" objective. Finally, digital must carry rules cannot be said to be necessary to promote fair competition in the market for television programming, as was claimed for analog must carry.¹⁰ Broadcasters already have a powerful tool to promote fair competition, analog must carry, which they will retain with or without digital must carry.

In the NPRM, the Commission proffered one possible justification for extending dual analog and digital must carry rights: to facilitate the transition to digital broadcasting.¹¹ But this objective can hardly justify further relegating cable networks to second class status as First Amendment speakers. This justification is very different than the objectives underlying analog must carry and it is unlikely that this justification would be deemed a "substantial governmental interest," as required to pass constitutional muster. The Court in *Turner II* stated: "[m]ust-carry is intended not to guarantee the financial health of all

⁹ *Turner II*, 117 S. Ct. at 1186; *Turner I*, 114 S. Ct. at 2469.

¹⁰ *Turner II*, 117 S. Ct. at 1186; *Turner I*, 114 S. Ct. at 2469.

¹¹ See NPRM at ¶ 1 (citing a goal of the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum, and retention of the strength and competitiveness of broadcast television); NPRM at ¶ 41 (expressing the desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized" and the desire to assure digital broadcasters that they will reach the audience they are licensed to serve.).

broadcasters . . ."¹² The Commission's desire to "assure" broadcasters about the transition to digital is not a legitimate goal. Moreover, the Commission lacks any record from Congress or any historical basis to assume that digital must carry is needed: conjectural harm to broadcasters is certainly not sufficient justification, yet that is all that is possible because digital broadcasting is in its very infancy.

In the *Turner* cases, the impact of analog must carry rules was the subject of much debate and analysis. By contrast, there can be no doubt that the impact of additional must carry obligations, on top of the existing analog must carry rules, would create an *enormous* burden on the cable industry — far greater than the analog must carry rules alone. While the Commission appears to acknowledge that digital must carry would harm cable networks,¹³ it may not grasp the full gravity of the harm that digital must carry would wreak upon these entities.

With analog must carry, the vast majority of broadcast signals were already carried long before broadcasters had any must carry rights.¹⁴ This is not the case for digital broadcast signals — each DTV signal is *entirely new*. And because most of the nation's

¹² *Turner II*, 117 S. Ct. at 1202. Similarly, as Justice O'Connor explained in her dissent in *Turner II*: "The must carry provisions have never been justified as a means of enhancing broadcast television." 117 S. Ct. at 1214.

¹³ The Commission acknowledges that to the extent that it imposes a digital must carry requirement, cable operators could be required to carry "double the amount of television stations, that will eventually carry identical content while having to drop various and varied cable programming services where channel capacity is limited." NPRM at ¶ 39; *see also*, NPRM at ¶ 46: ("a requirement to immediately commence carriage of all digital broadcast television stations when they come on-the-air would possibly be highly disruptive to cable subscribers, . . .").

¹⁴ *Turner II*, 117 S. Ct. at 1198-1199.

cable television systems are already channel-locked,¹⁵ there is no room to accommodate new DTV signals. The Commission is correct in its assessment that "significant channel line-up disruptions may occur as cable operators, whose systems are channel-locked would have to drop existing cable programming services to accommodate the carriage of digital television signals."¹⁶

Imposing digital must carry during the transition period could provide more than a dozen new channels with carriage mandates in the largest television markets. Although the "one-third cap" on must carry channels might provide some limit on the level of service disruption, it is clear that most cable systems (regardless of their channel capacity) would face a marked increase in enforceable must carry demands. The vast majority of these systems have little or no open capacity today. Complying with digital must carry would necessarily compel the deletion of existing cable programming services, like Lifetime Television.

In addition to harming established networks, digital must carry would also reduce the amount of extant channel capacity available to developing networks and would make it nearly impossible for LMN and other recently-launched networks to secure sufficient carriage on cable systems to survive. Broadcasters' must carry demands would likely increase

¹⁵ See NPRM at ¶ 45; see also Robert Kapler, *Cable Has No Space for Digital*, TV Technology, May 18, 1998, p. 10 (according to NCTA, "[m]ost cable systems would have to drop one analog channel for each digital channel carried"); Linda Moss, *Small Ops See 'Difficult' 1999*, Multichannel News, Aug. 10, 1998, p. 8 ("channel-locked small operators are also worried about the impact of any digital must carry for broadcasters' digital networks").

¹⁶ NPRM at ¶ 41.

exponentially under a digital must carry regime.¹⁷ In short, while the Commission has expressed its desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized,"¹⁸ Lifetime urges the Commission to consider the corresponding costs to cable networks and cable subscribers. Lifetime is certain that the imposition of digital must carry would have devastating consequences for cable networks in general, and for recently-launched networks, such as LMN, in particular.

Recent advancements in input selector switches (commonly known as "A/B switches") and antenna technology provide yet another powerful reason why digital must carry rules are both unnecessary and unconstitutional. These devices permit television viewers to switch between cable and broadcast inputs to their television set, thereby allowing cable subscribers to easily watch broadcast programs not carried on cable. While in *Turner II*, the Supreme Court deferred to Congress' judgment that A/B switches were not realistic alternatives to compulsory cable carriage, that same result surely will not apply in any future litigation regarding digital must carry. Congress' initial "findings" about A/B switches were drawn from old sources — sources that are now more than 12 years old.¹⁹ Today, deploying an A/B switch no longer poses a practical problem since these switches are now an integral component of television remote control devices. Indeed, "a switch mechanism is now incorporated into many [analog] television receivers (as well as into videotape recorders and

¹⁷ Approximately 6,000 cable channels in the United States are now occupied by broadcast signals where the licensee exercised its analog must carry right. *Turner II*, 117 S. Ct. at 1198-1199. As a conservative estimate, these licensees would seek to exercise must carry rights for at least 6,000 new digital broadcast signals.

¹⁸ NPRM at ¶ 41.

¹⁹ *Turner II*, 117 S. Ct. at 1213.

DBS receivers) and new digital television receivers may have multiple input possibilities *fully selectable from remote control devices*."²⁰

When analog must carry was advanced, it was feared that cable customers would not use A/B switches to view the limited number of less-popular local broadcast stations not carried on the cable system. In contrast, early purchasers of digital television sets will be "early adapters" who (1) are actively seeking out digital broadcast signals by purchasing HDTV sets and will not be deterred by any minor inconvenience; and (2) are unlikely to be overwhelmed by the need to deploy an A/B switch and maintain an off-air antenna. It is inconceivable that purchasers of new HDTV sets — who will spend up to \$10,000 for these devices — will be unable to afford a new antenna to receive these signals off-air.

B. The Commission Has No Statutory Authority To Impose Digital Must-Carry During The Transition Period

Section 614(b)(4)(B) of the Communications Act only directs the Commission to initiate a proceeding to establish "any changes in the signal carriage requirements" of cable systems in order to ensure carriage of broadcast signals "which have been changed to conform" with the new advanced standards.²¹ Thus, must carry can apply only *after* the transition to digital has been completed, and broadcasters are not entitled under the law to carriage of *both* their existing analog signal and their new digital signal(s). The Commission

²⁰ NPRM at ¶ 88 (emphasis added); *see also* NPRM at ¶ 16 ("[A/B] switches . . . may now be built into television receivers and can be easily controlled from a TV remote control device.")

²¹ 47 U.S.C. § 534(b)(4)(B).

simply has no authority to impose a dual must carry regime — one that extends must carry rights to digital broadcasts during the transition. This interpretation fully comports with the legislative history of Section 614(b)(4)(B), which states: "the conferees do not intend [Section 614(b)(4)(B)] to confer must carry status on advanced television or other video services offered on designated frequencies."²² It is also consistent with the existing limit on applying must carry so as to avoid duplicative network carriage.²³ This limit shows an obvious concern with minimizing redundant carriage obligations. If Congress had intended to take the radical step of conferring must carry rights on both analog and digital signals, it certainly would have dealt more explicitly with this issue in both the statute and in the legislative history. In short, it is clear that Congress *did not* intend to confer automatic must carry status on DTV signals, and the Commission has no authority to take such a dramatic step absent a clear directive from Congress.²⁴

III. PUBLIC POLICY CONSIDERATIONS ARGUE AGAINST THE IMPOSITION OF A DIGITAL MUST-CARRY OBLIGATION ON THE CABLE INDUSTRY

Even if digital must carry could somehow withstand judicial review, the Commission still should resist the pleas of digital broadcasters for protection from the competitive marketplace for cable carriage. A variety of compelling "public interest" concerns suggest that providing an automatic competitive preference to digital broadcasters

²² H. REP. NO. 104-458, at 161 (1996).

²³ See 47 U.S.C. § 534(b)(5).

²⁴ The Communications Act prohibits the Commission from imposing new signal carriage requirements except where the Act "expressly" provides for such requirements. 47 U.S.C. § 544(f)(1).

would be counter to the objectives that both Congress and the Commission have long sought to promote.

First, digital must carry would have a devastating impact on programming diversity. As the Commission is well aware, cable programmers have stepped forward in recent years to fill the void in all sorts of previously underserved television markets, be they minority, female, children, or special interest audiences. These cable channels have increasingly gained audience share. Yet, if digital must carry were imposed, a multitude of these diverse cable programming sources would be replaced by either a blank screen or redundant programming. This would be a tragic waste of scarce and valuable cable channel capacity.

As noted above, Lifetime's new LMN was deliberately launched on a compressed digital basis to maximize channel efficiency and programming delivery. It occupies the equivalent of less than 1 MHz. If every broadcaster across the country is guaranteed a full 6 MHz digital cable channel slot, in **addition** to its existing 6 MHz analog cable channel slot, scores of existing cable services would be dropped and an array of potential video offerings would be delayed or lost forever. Decisions to launch new programming services, after all, are linked directly to projections about obtaining cable carriage. Faced with competition from digital broadcasters armed with a government-granted right to carriage, many entrepreneurial cable programmers would reconsider or scrap altogether plans to launch new networks.

Lifetime submits that imposing digital must carry to promote HDTV would be particularly unfortunate, because, for the foreseeable future, the overwhelming majority of

television households will not even be able to view the redundant digital signal. Only those few consumers willing to spend up to \$10,000 for a new HDTV set would benefit. Lifetime sees no reason why programming diversity for the vast majority of cable households should be made to suffer so dramatically in exchange for this very limited benefit.

From the viewpoint of the typical consumer (who cannot be expected to purchase an expensive HDTV set in the near term), digital must carry makes little sense. Popular programming channels would be lost so that the few viewers with HDTV sets could enjoy the benefits of HDTV – benefits that already could be secured simply by tuning to the over-the-air broadcast.

Analog must carry was premised on the need to combat potential ill-effects from the alleged "bottleneck" control by cable operators over video programming delivery. The same rationale does not apply in the case of digital must carry. The Commission must recognize that the scarcity of HDTV sets is the real "bottleneck" here. Intrusive government regulation aimed at cable systems, will do little, if anything, to solve that problem. Even if HDTV sets do proliferate over time, the use of convenient A/B switches should ensure that operators do not impede viewer access to digital broadcasts. Assuming *arguendo* that digital broadcasts lack ubiquitous delivery, it does not necessarily follow that across-the-board must carry is the appropriate government response. Must carry was never intended to ensure each broadcaster a television audience exceeding its off-air viewers.

The Commission should also recognize that the assumption underlying digital must carry may be fatally flawed. There is no evidence that granting digital broadcasters automatic cable carriage rights will hasten the advent of HDTV. One of the most serious

obstacles to HDTV growth for the foreseeable future will be the limited amount of HDTV programming available to the public. Consumers naturally will be reluctant to purchase extremely expensive HDTV sets if little HDTV programming is available. Granting digital broadcasters redundant access to television households by guaranteeing them both over-the-air delivery and cable delivery for analog and digital channels during the transition period will strain cable capacity and reduce the likelihood that cable programmers (like Lifetime) will launch HDTV versions. Moreover, if broadcasters are assured universal cable access, they are less likely to devote their full resources to maximizing the quality of their over-the-air digital signals. This will undercut the effectiveness of the A/B switch option and disserve the non-cable subscribing audience that the initial must carry rules were designed to protect.

Even more troubling from a cable infrastructure perspective is a government mandate that artificially distorts the marketplace and requires a sub-optimal use of cable capacity. The 1996 Telecommunications Act was intended to promote competition in the marketplace. Nevertheless, digital must carry would have the unintended effect of discouraging the very sort of cable system upgrades that the Commission seeks, not only to maximize video offerings, but to deliver new telephony and Internet access services. If operators cannot maximize their revenues by putting expanded capacity to its most productive and profitable use, costly upgrades will be delayed. The Commission should also consider that the growth of cable programming networks has not only benefited previously underserved segments of the viewing audience, but has increased the quality of broadcast television, which now must compete for viewers with cable networks. The government should not grant further advantages to broadcasters at the expense of cable networks.

As the Commission has recognized, retransmission consent and private negotiation will be the vehicle by which the overwhelming majority of broadcasters will obtain cable carriage for their digital signals.²⁵ Negotiations have begun in earnest, and, by all accounts, these discussions have been constructive.²⁶ MediaOne, for example, reports that about half of its retransmission agreements already include digital carriage specifications.²⁷ Government intervention will not advance this process. As Chairman Kennard stated again last week: "the pace and direction of the transition to digital TV will be set by the private sector, by the marketplace and by competition."²⁸ Lifetime urges the Commission to let *market forces* establish the timing and terms under which digital broadcast signals will be carried over cable systems. Network affiliates will be the first digital broadcasters, and these entities are well positioned to negotiate for carriage under retransmission consent agreements.²⁹

²⁵ See NPRM at ¶ 33.

²⁶ For example, TCI President and CEO Leo Hindery stated that "broadcasters and the cable industry are very close to some common understanding that will bridge the gap." Leslie Ellis and Ted Hearn, *Peace in our Time? TCI's Hindery Hints at HDTV Harmony*, Multichannel News, Jul. 27, 1998, p. 1. Similarly, another TCI executive was quoted as saying: "we're definitely moving ahead," while a CBS executive stated: "It looks like things are going to work out." *Id.*, p. 52.

²⁷ CableFax Daily, Oct. 7, 1998, p. 1.

²⁸ *Statement by FCC Chairman William Kennard on Digital Television Transition*, FCC News, Oct. 6, 1998.

²⁹ Indeed, the Commission acknowledges that "stations not affiliated with the four major networks and commercial television station in smaller markets are those broadcasters most likely to exercise the must carry option, but a number of stations will not commence digital operations until the year 2002." NPRM at ¶ 33.

Finally, digital television is in its very infancy. Countless open issues surrounding the transition to DTV remain unanswered. Given the myriad complexities and uncertainties surrounding the transition to digital television, government intervention now or in the immediate future would be premature and would almost certainly be counter-productive to the goal of transitioning to DTV.

CONCLUSION

Lifetime has demonstrated that the Commission has no authority under the Communications Act to promulgate digital must carry rules until the current transition period is over and the conversion to digital broadcasting is completed. Lifetime has also shown that the vast legal and factual differences between the existing analog must carry law enacted by Congress and potential new digital must carry regulations created by the Commission, make it highly unlikely that the latter would withstand the inevitable judicial review.

Finally, Lifetime has explained that, for a number of important public policy reasons, it would be unwise for the Commission to impose digital must carry rules. Enactment of such rules would be particularly regrettable at this time, because digital television is in its very infancy and A/B switches appear to be a viable, far less intrusive means of ensuring digital broadcasters access to cable households.

The Commission must recognize that digital must carry rules would pose terribly adverse consequences for cable programmers, including established networks like

Lifetime Television and recently-launched digital networks like LMN. For these reasons, Lifetime urges the Commission to reject the adoption of digital must carry rules during the transition period.

Respectfully submitted,

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